(d) *Decision on appeal*

I allowed the appeal and set aside the conviction and sentence after studying the appeal records as well as hearing both counsel for the appellant and the learned deputy. I was satisfied that the president's approach to the determination of issues involved was wrong. In the first place, she should have come to the conclusion that there was no *prima facie* case and should not have called for the defence. But having called for the defence, she should have given sufficient consideration to the evidence given by the appellant and his witnesses. I was not unmindful that whilst an appellate court could only read the appeal records without hearing the evidence and seeing the witnesses, but in this case having perused the appeal records and having heard and considered the submissions of counsel for the appellant and the respondent, I was satisfied that not only there was no *prima facie* case proved against the appellant but also that the evidence adduced by the defence had created a reasonable doubt whether or not the appellant had committed the offence of criminal breach of trust by an agent as alleged by the prosecution. Therefore, without disregarding the judgment appealed from and having given due consideration and due weight to the findings of fact of the lower court, I considered that the conviction should be set aside not only because it was against the weight of the evidence but also because the learned president had failed to consider all the evidence that was before her and in that sense had also failed to consider fully the defence evidence. (See *Mohamed Shariff* v. *Public Prosecutor*[9]).

Conviction set aside.

Solicitors: *Rithauddeen & Aziz.*

SECURICOR (M) SDN. BHD. v. UNIVERSAL CARS SDN. BHD.

[O.C.J. (George J.) April 25 & May 8, 1984]

[Kuala Lumpur – Companies (Winding Up) No. 58 of 1982]

Company Law – Winding-up of company – Conditions for – Companies Act 1965, s.218(1)(e) & 218(2)(a).

It is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the court the jurisdiction. This presumption is rebuttable.

Case referred to:

(1) *In re London and Paris Banking Corporation* (1874) L.R. 19 Eq. Cases 444.

PETITION.

K.H. Koh for the petitioner.
K. Anantham for the respondent.

Cur. Adv. Vult.

George J: On April 27, 1984 I dismissed the petition by Securicor (M) Sdn. Bhd. to wind up Universal Cars Sdn. Bhd.

By section 218(1)(e) of the Companies Act the Court may order the winding up of a company if it is unable to pay its debts. By section 218(2)(a) the company shall be deemed unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding $500.00 then due has made a demand for the same and the company has for 3 weeks thereafter neglected to pay the same. It is to be noted that it is not the neglect to meet the demand of the creditor that gives the jurisdiction to the Court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the Court the jurisdiction. This presumption is rebuttable.

In the instant case it seemed to me that the position was on all fours with the position that obtained *In Re London and Paris Banking Corporation*[1]. In that case Sir G. Jessel M.R. said at 446

". . It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted". Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is *bona fide* disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute."

In the instant case the company did not neglect the statutory demand of June 5, 1982. By its letter dated June 22, 1982 in reply to the

demand it challenged the penalty charges imposed. Although by the contract between the parties the petitioner had reserved itself the right to impose the penalty for late payment, the imposition of it, in the face of the challenge which on the facts of the instant case it seemed to me was made *bona fide*, is an issue to be tried.

In the event, the section 218(2)(a) presumption that arose was rebutted whereupon the section 218(1)(e) position ceased to be available to the petitioner.

Apart from the section 218(2)(a) presumption there is nothing else to suggest that the company is anything but solvent.

The petition should not have been presented – at any rate was prematurely presented and should have been and was dismissed with costs.

Petition dismissed.

Solicitors: *Uppal & Koh; Chin & Co.*

TONG AH SENG & ANOR. v. CHAN SWEE LAN

[O.C.J. (Mohamed Dzaiddin J.) April 12 & May 17, 1984]

[Penang – Originating Motion No. 39 of 1983]

Practice & Procedure – Notice of Appeal – Service must be within reasonable time

Under the Subordinate Courts Rules 1980, there is no time limit required for the service of the Notice of Appeal on the respondent's solicitors. However, there must be service which must be within a reasonable time.

Cases referred to:–

(1) *Ratnam* v. *Cumarasamy* [1965] 1 M.L.J. 228, P.C.

(2) *Ahmad bin Yahaya* v. *Ahmad bin Sulaiman* [1972] 2 M.L.J. 109.

(3) *Cheah Teong Tat* v. *Ho Gee Seng & Ors.* [1975] 2 M.L.J. 149.

ORIGINATING MOTION.

Darshan Singh for the appellants.
Tan Beng Hong for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: The Appellants have asked this Court for a declaration that the Notice of Appeal No. 4/83 dated 14th March 1983 served on the Respondent's solicitors on 29th April 1983 was properly and validly served and therefore within time. Alternatively, the time limit for serving the said Notice of Appeal on the Respondent be extended to two weeks from the date of this Order.

This application is supported by the affidavit of the Appellants affirmed jointly on July 30, 1983. It is deposed that on March 14, 1983 the Appellants filed the Notice of Appeal against the Order of the Magistrate given on March 9, 1983. The Notice of Appeal was served on the Respondent's solicitors on April 29, 1983, which is 37 days from the last day of filing the Notice. It is contended by the Appellants both in their affidavit and in the submission by their counsel that the Appeal had been properly brought because the Subordinate Courts Rules 1980 does not specify that the Notice to be served on the Respondent must be within any specified time. Counsel refers to Order 49 Rule 2(6) which states as follows:

"(6) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected."

The Appellants have admitted in their affidavit that the Notice of Appeal was served on the Respondent's solicitors more than a month after the last day of filing of the Notice of Appeal. The grounds therein stated were delay due to change of solicitors as counsel then acting for them had discharged himself and another counsel had taken over the conduct of the matter. Then, when the present solicitors subsequently took over the conduct of the hearing, they filed the Notice of Appeal but their clerk made a mistake by not serving the Notice on the Respondent's solicitors until April 29, 1983. It is thus clear that failure to serve the said Notice of Appeal within time was due to the mistake or omission on the part of the solicitor's clerk.

Upon considering the relevant Order under the Subordinate Courts Rules 1980, I agree that there is no time limit required for the service of the Notice of Appeal on the Respondent's solicitors. However, there must be service which in my opinion must be within a reasonable time. In the present case, the parties are in Penang and the solicitors too have their practices in Penang and